IN THE HIGH COURT OF JUDICATURE AT BOMBAY

APPELLATE SIDE

SECOND APPEAL NO. 272 OF 2004

Isqaq Babu Pathan ... Appellant

Vs.

Vithal Bhagwan Sanmukh & Ors. ... Respondents

Mr. S.S.Patwardhan, Advocate for the appellant.

Mr. A.M.Kulkarni, Advocate for Respondents 2A & 3.

CORAM: J.H.BHATIA,J.

DATE : 20th September, 2007

P.C.

1. Heard earned counsel for the parties. Perused the record.

2. The plaintiff, who is the respondent No.1 before this Court, filed Regular Civil Suit No.126 of 1992 contending that he is a tenant in the suit premises. The landlord Hussain Mohammed Shaikh had expired and the widow of his landlord had also expired. Defendants Nos. 1 and 2, who are respondents Nos 2 and 3 before this

Court, claim to be landlords on the basis of being nephews of deceased Hussain, who had died issueless. On the other hand, defendant No.3, who is appellant before this Court, claims to be landlord on the basis of a Will allegedly executed by the wife of the deceased landlord. On one hand, defendants Nos. 1 and 2 claimed the rent from the plaintiff and on the other, defendant No.3 claimed the rent. With these pleadings, the plaintiff sought directions from the Court. Clearly, it is an interpleader suit under Order XXXV of C.P.C. Defendant Nos.1 and 2 on one hand and defendant No.3 on the other filed their written statement and contested against each other. Several issues were framed. The trial Court came to the conclusion that the defendants Nos. 1 and 2 being the legal heirs of deceased Hussain,the original landlord, are entitled to claim as landlords. The trial Court held that the defendant No.3 has failed to prove the Will. Defendant No.3 preferred Regular Civil Appeal No.60 of 1994. The Appeal also came to be dismissed. This is Second Appeal filed by him.

3. There is concurrent finding of Courts below that the defendant No.3 has failed to prove the Will and that he is not entitled to claim rent from the plaintiff. The Courts below gave concurrent finding that defendants Nos. 1 and 2 being the distant kindred of deceased landlord Hussain are entitled to succeed. Relying on

Section 61 from Mohammedan Law by Mulla, the trial court held that "if a Mohammedan dies leaving a wife and distant kindred, the wife as a sharer which is 1/4 and the remaining three will go to the distant kindred". As such 3/4th share in the property will go to defendants Nos. 1 and 2 and 1/4th would go to Aminabai, wife of deceased Hussain. However, Aminabai also died issueless and without any legal heir. Therefore, she could not dispose of more than 1/3rd share in her 1/4th share without the consent of defendants Nos. 1 and 2. As such, she could bequeath, at the most, 1/12th share in the property. In view of this, the Courts held that Aminabai could not have bequeathed whole of the property in favour of defendant No.1. Learned Counsel for the appellant could not point out any fault in this legal proposition.

4. He only pointed out that suit was not tenable under Order XXXV of C.P.C. According to him, in view of the provisions of Rule 5 of Order XXXV, a tenant cannot institute interpleader suit against his landlord. In fact, Rule 5 provides that a tenant would not sue his landlord for the purpose of compelling him to interplead with any persons other than persons making claim through such landlord. In the present case, the plaintiff has not filed the suit against his landlord i.e. Hussain or his widow. He has filed the suit seeking a direction

because third parties claimed the right to recover rent. The learned Counsel for the appellant in support of his contention, relied on the Judgment in the case of **Mangal Bhikaji Nagpase vs. State of Maharashtra and another**, **1997 (2) Mh.L.J.55.** In that case, the plaintiff himself claims certain interest in the property. In the present case, the plaintiff does not claim any interest in the property. He has filed the suit against the persons, who claimed to have derived title from the landlord or his widow. In fact, in **Mangal Bhikaji Nagpase,** this Court relied upon the Judgment of the Supreme Court in **Subhash Chandra vs. Mohd. Sharif, AIR 1990 SC 636** wherein Their Lordships had held that a tenant in such a case can attack the derivative title of the transferee but not on the ground that the landlord who had initially inducted him in possession did not have the right to do so. It is clear that a tenant can file interpleader suit against the persons who claim to have derivative title but not against the landlord. In the present case, taking into consideration these circumstances, there is no substance in the contention of the learned Counsel for the appellant. No substantial question of law is involved in the Appeal.

Therefore, the Appeal stands dismissed.

(J.H.BHATIA,J.)